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No. 88-1803

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1988

DAVID EDWARD GLENDENING,

Petitioner,

v.

STATE OF FLORIDA

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF OF RESPONDENT IN OPPOSITION

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JUNE, 1989

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QUESTIONS PRESENTED

Petitioner presents the following questions (Pet. i):

I. Does using a two-way mirror to prevent the complaining witness from seeing or hearing the petitioner, over objection and without an individualized showing of necessity, conflict with **Coy v. Iowa** and thereby violate the petitioner's sixth amendment confrontation right?

II. Does admitting over objection the repudiated hearsay statements of a three and one-half year old complaining witness who did not understand the difference between telling the truth and telling a lie conflict with **Ohio v. Roberts** and thereby violate the petitioner's sixth amendment confrontation right?

III. Does applying Florida's new statutory child abuse hearsay exception to an offense occurring before its effective date to allow otherwise inadmissible hearsay into evidence on the theory that unconfronted videotaped testimony is constitutionally equivalent to live, confronted testimony at trial substantially diminish the constitutional right to confrontation in violation of the prohibition against **ex post facto** laws?

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B. There was no Confrontation Clause violation; but, even if there was an error, it was harmless in this case.

II. The application of section 90.803(23), Florida Statutes (1985) to determine the

admissibility of the child's out-of-court statements did not conflict with Ohio v. Roberts.

III. The application of the child abuse hearsay exception did not violate the Ex Post Facto Clause.

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BRIEF OF RESPONDENT IN OPPOSITION

OPINIONS BELOW

The decision of the Supreme Court of Florida is reported in Glendening v. State, 536 So.2d 212 (Fla. 1988), (Pet.App. A 11-26). The decision of the District Court of Appeal of Florida, Second District is reported as Glendening v. State, 503 So.2d 335 (Fla. 2d DCA 1987) (Pet.App.A1-10).

JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to 28 U.S.C. Section 1257(3).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The statutes and constitutional provisions involved are the Confrontation Clause of the Sixth Amendment of the United States Constitution, which provides, in part:

> IN ALL CRIMINAL PROSECUTIONS, THE ACCUSED SHALL ENJOY THE RIGHT. . . TO BE CONFRONTED WITH THE WITNESSES AGAINST HIM,

Section 90.803(23), Florida Statutes (1985) provides for the admission into evidence of the hearsay statements made by child victims with a physical, mental, emotional, or developmental age of eleven or less describing acts of abuse.

Section 90.803(23) requires that:

1. The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability. In making its determination, the court may consider the mental and physical age and maturity of the child, the nature and duration of the abuse or offense, the relationship of the child to the offender, the reliability of the assertion, the reliability of the child victim, and any other factor deemed appropriate; and

2. The child either:

   a. Testifies; or

   b. Is unavailable as a witness, provided that there is other corroborative evidence of the abuse or offense. Unavailability shall include a finding by the court that the child's participation in the trial or proceeding would result in a substantial likelihood of severe emotional or mental harm, in addition to findings pursuant to §90.804(1).

(b) In a criminal action, the defendant shall be notified no later than 10 days before trial that a statement which qualifies as a hearsay exception pursuant to this subsection will be offered as evidence at trial. The notice shall include a written statement of the content of the child's statement, the time at which the statement was made, the circumstances surrounding the statement which indicate its reliability, and such other particulars as necessary to provide full disclosure of the statement.

(c) The court shall make specific findings of fact, on the record, as to the basis for its ruling under this subsection.

Section 92.53, Florida Statutes (1985) authorizes, subsequent to motion, hearing, and a finding by the trial court of substantial likelihood of at least moderate emotional or mental harm, the videotaping of testimony of a child victim or witness in sexual or child abuse cases (Pet. App. A 27-28; Resp. App. A1-3).

STATEMENT OF THE CASE

On July 26, 1985, Petitioner, David Glendening ("Glendening"), was charged by information with sexual battery upon a child eleven years of age or younger, in violation of §794.011(2), Florida Statutes (1985). The acts upon which the charge was based were alleged to have occurred between September 1, 1984 and June 24, 1985 and the victim was Glendening's three-and-one-half-year-old daughter (the "child"). (Pet. App. A-14).

Glendening was found guilty of the charged offense in the Circuit Court of the Twelfth Judicial Circuit, Sarasota County, Florida; and on direct appeal, the District Court of Appeal, Second District, affirmed Glendening's conviction and sentence, rejecting his arguments that the trial court erred in admitting the out-of-court statements made by the child victim

under Section 90.803(23), Florida Statutes. (Pet.App.A-1-10). The Florida Supreme Court accepted review of Glendening v. State 503 So.2d 335 (Fla. 2d DCA 1987), in which the District Court expressly declared valid Section 90.803(23), Florida Statutes (1985). (Pet.App.A-14). The Florida Supreme Court approved the decision of the District Court and affirmed Glendening's conviction. (Pet.App.A-11-26, 536 So.2d 212 (Fla. 1988). In so doing, the Florida Supreme Court ruled, inter alia, (i) that the application of §90.803(23) did not violate the Ex Post Facto Clause, (ii) allowing the child's testimony to be videotaped was based on a case-specific finding of necessity, unlike the scenario presented in Coy v. Iowa, ____ U.S. ____, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988), and, even if the denial of face-to-face confrontation had been error, any error

would have been harmless in this case; and (iii) even if the additional safeguards of Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), under the "unavailable declarant" scenario were applicable, the Roberts standard was satisfied in this case in which the abuse was corroborated by medical testimony and two witnesses who testified that Glendening admitted to them that he committed the offenses. (Pet.App.A-14-23).

STATEMENT OF THE FACTS

Prior to trial, the State served a motion to videotape the child's testimony for introduction at trial, pursuant to section 92.53, Florida Statutes (1985) (Pet. App. A-6). The state presented evidence on the motion from the child's mother, the child's guardian ad litem, who spent approximately 20 days with the

child, a pediatrician who had attempted to examine the child, and a social worker who worked with sexually abused children and met with the child on nine (9) occasions prior to the hearing. (R. 140-148, 256-286, R. 276). Based on the evidence presented at the hearing, the trial court found that there was a substantial likelihood that the child would suffer at least moderate emotional or mental harm if she were required to testify in open court in the presence of Glendening, granted the state's motion to videotape her testimony, and ruled that the defense would be entitled to interview the child and have their psychological expert observe the interview. (R. 286, 295). The trial court ruled that Glendening would be excluded from the presence of the child during the videotaping after finding "that the evidence that's been presented to the Court does indicate that there is a great

deal of fear on the part of the child of the father and his presence." (R. 556) Glendening viewed the videotaping session via a two-way mirror (Pet.App.A-6).

The child's videotaped testimony was taken before the trial court with participation by both attorneys. (Pet.App.A-9). The trial court conducted a preliminary voir dire of the child; and, though she was unable to explain the difference between the truth and a lie, the trial court concluded that the child was competent to testify because she showed an above average intelligence for a three year-old and was aware of her surroundings, attributing her inability to explain the difference between a truth and a lie to the inartful questioning by the court and prosecutor. (Pet. App. A-6). During the videotaped testimony, the child did not implicate Glendening in any misconduct. (Pet. App. A-6). At trial,

Glendening did not object to the introduction of the child's videotaped testimony and he caused it to be replayed during his own case. (Pet.App.A-6) Glendening did not challenge the admissibility of the videotape on direct appeal in the Second District Court of Appeal. (Pet. App. A-6).

In compliance with Section 90.803(23), Florida Statues (1985), the State filed a pretrial notice of intent to use the hearsay statements of the child at trial. The state set forth the written content of the child's statements, the time at which the statements were made, and the conditions surrounding the statements which indicated their reliability. (R. 589-601).

Section 90.803(23) provides for the admission of hearsay statements of child sexual abuse victims in child sexual battery prosecutions if, inter alia, (1)

there are no indications of lack of trustworthiness in the reporting source, (2) the court finds sufficient safeguards of reliability of the hearsay, and (3) the child (a) testifies or (b) is unavailable as a witness, provided there is sufficient corroborative evidence. The trial court observed that it could not rule upon the admissibility of the statements without actually hearing the witness' testimony concerning the circumstances under which the child's statements were made; and therefore, the trial court's ruling on the admissibility of hearsay testimony, pursuant to §90.803(23), was made at Glendening's trial.

The State presented evidence at trial that on June 23, or 24, 1985, the child came out of the bathroom and showed her mother that something red and about the size of a golf ball was coming down from inside of her. (R. 1336). The next day,

the child's mother, Dee, took her to Dr. Meyer, a pediatrician. (R. 1337-1338). The child was very fearful, she kicked, screamed, tried to jump off the examining table and cried hysterically. Dr. Meyer was unable to examine her. (R. 1349, 1421). Dr. Meyer referred the child to a female gynecologist, Dr. Linda Boczar. (R. 1349; 1422). Dee took the child straight from Dr. Meyer's office to Dr. Boczar's office. (R. 1363).

Dee and Glendening were separated from March 1984 until September of 1984. (R. 1335). When Glendening moved back home, Dee noticed changes in the child's behavior. (R. 1338). Glendening often took her out alone; sometimes, she would protest and ask that her younger sister come along (R. 1339). On many occasions, the child would be crying when she returned home. (R. 1339). Dee questioned Glendening about where he took

the child, but she never got a straight answer. (R. 1343, 1345). Though the child was potty trained, after Glendening moved back home, the child began regressing; she had accidents and insisted on wearing a diaper. (R. 1342). The child also began having trouble sleeping at night. (R. 1343).

When Dee Glendening brought the child to Dr. Boczar on June 25, she would not let Dr. Boczar examine her. (R. 1450). Dr. Boczar recommended that the child be admitted to the hospital and put under anesthesia before doing the examination. (R. 1452). The next day, Dee took the child to the hospital to be examined. (R. 1353).

When the child was brought into the operating room, they walked her around to get her comfortable with the medical personnel, and the child kept saying, "don't hurt my butt, don't hurt my bottom,

don't let the man hurt me, not the man, not the man" (R. 1460, 1490). At one point, when Dr. Boczar asked the child who hurt her bottom, the child replied, "daddy" (R. 1462). At trial, defense counsel stated that he had no objection to Dr. Boczar stating what the child told her. (Pet.App.A-6, R. 1461).

The examination of the child revealed a normal vagina (R. 1463). However, Dr. Boczar was able to separate her fingers in the child's rectum four centimeters (R. 1463, 1465). Dr. Boczar's examination was consistent with penetration of the rectum one time forcefully or repeatedly and very gently (R. 1475). According to Dr. Boczar, the child had a very laxed sphincter, like those found in women who submit to anal intercourse (R. 1475). Dr. Boczar stated that in her opinion, to a reasonable degree of medical certainty,

the child had been sexually abused (R. 1523). Dr. Boczar could not state that the child's anus had been penetrated by a penis (R. 1523). The child remained in the hospital overnight and when she was discharged from the hosptal, Dee contacted the sheriff's department. (R. 1355).

Rebecca Winkel, a case coordinator for the Child Protection Team in Sarasota County, was recognized by the trial court as an expert in the area of interviewing children, specifically in the area of sexual abuse (R. 1552-1553).

Winkel met the child on June 27, 1985, for the purpose of conducting an anatomical doll interview (R. 1553). Winkel did not discuss the case with Dee Glendening prior to the interview with the child. (R. 1554). When the child was asked if anyone had touched her butt, she responded that daddy did, and she named him David (R. 1561). The child said he

touched her butt with his "pee pee" (R. 1561). The child answered yes to the questions whether he put his "pee pee" inside her butt and whether it hurt (R. 1561-1562). Winkel re-enacted for the jury the child's demonstration of what she meant by "daddy hurt my butt" (R. 1562). Winkel also showed the jury charts that the child had marked to show where he hurt her (R. 1564-1566). Winkel testified that in her opinion, based upon her interview with the child, she had been sexually abused by her father (R. 1571). Except for an initial objection on the grounds of corpus delicti, the defense did not object to Winkel's testimony on the basis of hearsay until after Winkel testified and the State sought to introduce the tape recording of Ms. Winkel's doll interview with the child. (R. 1575, Pet.App.A-7).

Both the trial court and Second District Court of Appeal concluded that Glendening's hearsay objection to Ms. Winkel's testimony was untimely, but in any event, when the objection was made, the trial court removed the jury from the courtroom and made the requisite findings required by §90.803(23)(a)1. (Pet.App.A-7-8).

The videotape of the child's testimony was introduced into evidence and played during the State's case at trial without objection. (R. 1632, 1637, 1641). Prior to playing the videotape, the trial court instructed the jury to consider and give the same weight to the child's videotaped testimony as if she testified in court. (R. 1637).

Ruth Lynn Shapiro, a social worker from the Suncoast Mental Health Center, conducted 13 counseling sessions with the child. Prior to having Shapiro testify

before the jury, the State proffered her testimony, seeking to admit statments made on seven specified occasions. (R. 1760-1793, R 591). Following the proffer, the court determined that statements made by the child during three of the counseling sessions were admissible. (R 1794-1797).

On July 17, 1985, during a therapy session involving books and puppets, the child said her daddy was not touching her "pee pee" any more (R. 1805). On August 7, 1985, the child stated that daddy hurt her butt (R. 1806). On November 7, 1985, during a therapy session involving anatomically-correct dolls, the child stated that daddy was a bad boy because he hurt her (R. 1809). The defense declined to cross-examine Shapiro. (R. 1812).

Detective Jacqueline Barber from the Sarasota County Sheriff's Department responded to a call from the child's

mother regarding a sexual battery (R. 1644). The following day, Detective Barber took Glendening to the Sheriff's Department for questioning (R. 1659). Glendening smelled of alcohol (R. 1661). He was given his Miranda warnings and Glendening stated he did not know who could have done this to the child. (R. 1661). When told that the child had named him as the perpetrator, Glendening responded, "I do not believe I could do that to [the child]. Could I have done that, when I was out of my mind, could I have done it?" (R. 1667). Glendening asked to take a polygraph exam and be hypnotized and he admitted using cocaine and said he had a problem with alcohol (R. 1668).

Ralph Fleming, Jr. a prisoner with eight previous convictions, was Glendening's cellmate at the Sarasota County Jail. (R. 1816). Glendening

admitted to Fleming that he had molested his daughter (R. 1818-1819). Glendening told Fleming he would take the child out shopping early in the morning and buy her gifts (R. 1820). Glendening admitted he did this over a period of months (R. 1820). Glendening used the term "got her" to mean he had anal intercourse with the child (R. 1820). Glendening told Fleming that he would put cocaine on the table and show the child how to snort it through a straw; then he would anally molest the child (R. 1821).

William Flowers was also a prisoner in the Sarasota County Jail with Glendening. (R. 1843). Flowers was present when Glendening made the statements to Fleming about molesting the child. (R. 1845). Flowers essentially corroborated Fleming's testimony (R. 1846-1847).

On June 27, 1985, when the child was at the sheriff's department, she picked up a straw that was near a coffee pot, got upon the table, put the straw in her nostril, leaned over and snorted in a line along the table (R. 1836). Detective Barber asked the child what she was doing and the child replied "sneaking around" (R. 1837). When Detective Barber asked what was missing, the child replied "white stuff" (R. 1837). When Detective Barber was recalled by the state for the purpose of testifying concerning the child's spontaneous demonstration with the straw and response to the detective's inquiry, the defense objected solely on the grounds of relevancy.

REASONS FOR DENYING THE WRIT

The decision below was correct.

I. A. The trial court's case-specific finding of necessity authorizing the videotaping of the child-victim's testimony and the unobjected-to admission of the videotaped testimony at trial did not violate the Confrontation Clause of the Sixth Amendment as interpreted in Coy v. Iowa.

After finding "that the evidence that's been presented to the court does indicate that there is a great deal of fear on the part of the child of the father and his presence," the trial court ruled that the child's testimony would be videotaped and Glendening would be required to view the testimony by means of a two-way mirror. (R. 556). During her videotaped testimony, the child did not

implicate Glendening in any misconduct. Glendening did not object to the admission of the child's videotaped testimony at trial, her videotaped testimony was replayed for the jury during the defendant's case, and Glendening did not challenge the admissibility of the videotaped testimony on direct appeal. (Pet.App.A-6).

Glendening's challenge to the child's videotaped testimony is now based on his assertion that the Florida Supreme Court's decision conflicts with Coy v. Iowa, U.S. ___, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988). The rationale set forth in Coy was two-fold: (1) the generalized presumption of trauma underlying the Iowa statutory procedure was insufficient to overcome the right to face-to-face confrontation; and (2) the trial court had not made an individualized finding as to need.

In its opinion, the Florida Supreme Court squarely addressed Coy and applied it to the facts of this particular case. In contrast to the statute at issue in Coy, section 92.53 requires an individual determination for each child witness that the use of videotaped testimony is necessary to prevent the child from suffering emotional or mental harm. The trial court conducted a hearing on this issue and, based on the testimony of four adult witnesses familiar with the child, concluded that the child would suffer at least moderate emotional or mental harm if required to testify in open court in the presence of Glendening. Thus, contary to Coy, the present case involved "a case-specific finding of necessity." 536 So.2d at 218, citing Coy, 108 S.Ct. at 2805 (O'Connor, J., Concurring). (Pet.App.A-21).

B. There was no Confrontation Clause violation, but, even if there was an error, it was harmless in this case.

This is not an appropriate case for review by this Court for yet another reason. As Justice Scalia observed in his majority opinion in Coy Confrontation Clause violations are subject to a harmless error analysis:

> We have recognized that other types of violations of the Confrontation Clause are subject to that harmless error analysis [error harmless beyond a reasonable doubt does not require reversal], and see no reason why denial of face-to-face confrontation should not be treated the same. An assessment of harmlessness cannot include consideration of whether the witness's testimony would have been unchanged, or the jury's assessment unaltered, had there been confrontation; such an inquiry would obviously involve pure speculation, and

> harmlessness must therefore be determined on the basis of the remaining evidence.

485 U.S. at ____, 108 S.Ct. at ____, 101 L.Ed.2d at 867 (O'Connor, J. concurring)

The Florida Supreme Court determined that if the denial of face-to-face confrontation had been error, any error would have been harmless in this case. 536 So.2d at 218. This holding was supported by a finding that the child's videotaped testimony did not implicate Glendening, the defense declined to cross-examine the child despite the opportunity to do so, and the exculpatory videotape was presented to the jury by the defense at trial. The "harmless error" test of Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), requires "the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute

to the verdict obtained." Id. at 24, 87 S.Ct. at 828. Applying the harmless error standard to the unique facts of this case, the Florida Supreme Court concluded "[B]ecause the videotaped testimony was totally exculpatory, the admission of the testimony unquestionably did not contribute to the conviction and was harmless beyond a reasonable doubt." 536 at 218, citation omitted. In applying the harmless error rule below, the state court announced no novel application of United States Supreme Court precedent. No further review is warranted.

II. The Application of Section 90.803(23) Florida Statutes to Determine the Admissibility of the Child's Out-of-Court Statements Did Not Conflict with Ohio v. Roberts.

Section 90.803(23), Florida Statutes (1985) admits the out-of-court statements of a child victim of sexual abuse

describing an act of sexual abuse, or other offenses involving an unlawful sexual act, performed in the presence of, with, by or on the declarant child if (1) the trial court determines that "the time, content, and circumstances of the statement provide sufficient safeguards of reliability;" and (2) the child either (a) testifies, or (b) is unavailable, and the abuse is corroborated by other evidence.

In Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), this court held that the Confrontation Clause is satisfied where the declarant whose out-of-court statement is sought to be introduced either testifies, or is shown to be unavailable and the hearsay statement bears adequate indicia of reliability. 448 U.S. at 65. When a hearsay declarant is not present for cross-examination at trial, hearsay statements are admissible only if they

bear adequate indicia of reliability and particularized guarantees of trustworthiness. Ohio v. Roberts, 448 U.S., at 66, 100 S.Ct., at 2539.

Glendening claims that the child was not a competent witness because she could not articulate the difference between telling the truth and telling a lie and, armed with this assertion, Glendening argues that the admission of her out-of-court statements conflicts with Roberts.

Glendening focuses on selected passages from the voir dire of the child in arguing that she was not competent to testify. The Florida Supreme Court referred to the defense-cited excerpts which focused on the child's weakness as a witness; and found that other portions of the hearing supported her competency to testify. (Pet.App.A-23). The role of this Court is not to engage in a fourth fact-finding inquiry and proper respect must be

accorded the state court tribunal, particularly one that has rendered a carefully reasoned decision in a unique factual scenario.[1] Furthermore, the issue

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[1] Although the child did not understand the specific terms "truth" and "lie," the trial court specifically stated this was due to inartful questioning by the court and the prosecutor (R. 779). The trial court found the child to be alert and of above-average intelligence for a 3 year-old and concluded the child was competent to testify (R. 779-780).

Not all of the child's statements during the voir dire examination were inappropriate. The child knew her name and where she lives (R. 757). She knew who she lives with, that she goes to nursery school, and her parents' names (R. 758). The child said she goes to church (R. 760). The child said her mother had never talked to her about telling the truth and telling lies (R. 761). She stated she has a dog and a cat (R. 762). She answered yes when asked if she was chewing gum and said her mother gave it to her (R. 762). The child knew what Christmas was and said she wanted a Cabbage Patch Doll (R. 763). The child knew she had to be good to get a Cabbage Patch Doll (R. 764). The child knew that if she was told to take a nap at school and she did not, that would be bad (R. 766). The child knew her colors (R. 766-767). There is no reason why the statements which Glendening selectively incorporates should be given greater emphasis than the statements which evidenced her competence.

of the child's competency was peculiarly related to the unobjected-to videotaped testimony which was offered by the defense at trial. Thus, Glendening's competency challenge is waived. Futhermore, even if a child might be deemed incompetent to testify, a finding of reliability of the child's hearsay statement is not foreclosed. An illustration of the distinction between competency and reliability can be made by examining the excited utterance exception to the hearsay rule. Excited utterances have historically been considered reliable because it is thought that the declarant, speaking spontaneously while under the influence of a startling event, has not had the opportunity to fabricate. Section 90.803(23) requires the trial court to find that the time, content and circumstances of the statement provide

sufficient safeguards of reliability. Where, as here, the child testifies and is available for cross-examination to test the accuracy of the out-of-court statements, the argument in favor of admitting those statements is even more compelling.

If the child testifies, there is no confrontation issue. See, Green v. California, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970). Glendening was permitted full cross-examination of the child, he was accompanied by counsel behind the two-way mirror, he was able to communicate with counsel and the Florida Supreme Court determined that his opportunity to engage in full and effective cross-examination was not interfered with by his exclusion. 536 So.2d at 217, citing Kentucky v. Stinson, 482 U.S. 730, 107 S.Ct. 2658, 96 L.Ed.2d (1987). In this case, the unobjected-to

introduction of the child's videotaped testimony satisfied the preliminary requirement that the child either testify or be unavailable. 536 So.2d 219.

Furthermore, even if the additional safeguards of the Roberts "unavailable declarant scenario" were imposed, the Florida Supreme Court found that the result would be the same. Under Roberts, if the declarant is unavailable, the hearsay must be marked with particular guarantees of trustworthiness in order to be admissible. 100 S.Ct. at 2538. If unavailability is established, the hearsay statements are admissible under 90.803(23) only if the time, content, and circumstances provide sufficient safeguards of reliability and other corroborative evidence of the abuse or offense exists. Thus, Section 90.803(23) expands the indicia of reliability and particularized guarantees of

trustworthiness of Roberts. In this case, the evidence of abuse was corroborated by the medical testimony and Glendening's jailhouse admissions, which were not challenged in the Florida Supreme Court.

The national significance of the problem which Section 90.803(23), Florida Statutes (1985), was designed to remedy was set forth by the court in State v. Myatt, 237 Kan. 17, 697 P.2d 836 (1985):

> Often the child victim's out-of-court statements constitute the only proof of the crime of sexual abuse. Witnesses other than the victim and perpetrator are rare as people simply do not molest children in front of others. . . . Most often the offender is a relative or close acquaintance who has the opportuntity to be alone with the child. . . . Depending on the type of sexual contact, corroborating physical evidence may be absent or inconclusive. . . . The child may be unable to testify at trial due to fading memory, retraction of earlier statements due to guilt or fear, tender age, or inability to appreciate the proceedings in which he or she is a participant. Therefore, these

> hearsay statements are usually necessary to the proceedings as the only probative evidence available.

Federal courts examine the existence of corroborating physical and other evidence in determining the reliability of hearsay statements of child sexual abuse victims pursuant to Rule 803(24), Federal Rules of Evidence (1987). See also United States v. Dorian, 803 F.2d 1439 (8th Cir. 1986), E. Cleary, McCormick on Evidence, §§324.1, at 908-09 (3d Ed. 1984). Rule 803(24), Fed.R.Evid., is the "residual hearsay exception" which is often employed in federal child sex abuse prosecutions in admitting the hearsay statements of the child victim when other hearsay exceptions are inapplicable, and is the federal equivalent of Section 90.803(23), Florida Statutes, in this respect. The federal rule speaks to "circumstantial guarantees of trustworthiness" and the use of

corroborating evidence to determine reliability is widely recognized. Commentators agree that:

> Establishing the reliabilty of the hearsay statements of a child victim of sexual abuse is best accomplished through consideration of the totality of the circumstances. Circumstantial indicia of reliability has been accepted in the federal courts as a "catch-all" basis for admission of hearsay evidence which does not fall within the parameters of a traditional hearsay exception.

Note, Recent Decision: Commonwealth v. Haber, 25 Duquesne L. Rev. 532 (1986).

It is clear that the trial court, the Second District Court of Appeal, and the Supreme Court of Florida correctly applied

§90.803(23) and the principles of Ohio v. Roberts in determining the admissibility of the child's hearsay statements and no conflict exists to warrant the exercise of this Court's discretionary jurisdiction.[2]

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[2] This court has already denied certiorari to the petitioner in Cook v. Florida, ____ U.S. ____, 109 S.Ct. 1542, ___ L.Ed.2d ___, [No. 88-6267, Mar. 20, 1989), and Roark v. State, (No. 88-6862, cert. denied May 15, 1989). In Cook, the petitioner raised Coy as grounds for taking jurisdiction to determine the validity of the child abuse victim hearsay rule, Section 90.803(23), Florida Statutes (1987). In Roark, the petitioner challenged the constitutionality of section 92.53, Florida Statutes (1985), which authorizes, subsequent to motion, hearing, and a finding that there is substantial likelihood that a victim or witness under age 16 would suffer at least moderate emotional or mental harm, the videotaping of the testimony of a child victim or witness in sexual or child abuse cases. A petition for certiorari is pending in the case of Perez v. Florida, U.S.S.Ct. #88-7208, docketed March 31, 1989. (Corrected filing made May 31, 1989). In Perez, petitioner is raising a Sixth Amendment confrontation challenge to the constitutionality of section 90.803(23), Florida's child abuse victim hearsay rule.

III. The application of the child abuse hearsay exception did not violate the Ex Post Facto Clause.

Glendening contends that the Florida Supreme Court's determination that the application of the child abuse hearsay exception did not violate the constitutional prohibition against ex post facto laws is in conflict with this Court's prior decisions.

In finding no ex post facto violation, the Florida Supreme Court relied exclusively upon the precedent from this Court and noted that the proscription against laws which effect the legal rules of evidence or receive less, or different, testimony in order to convict the offender has been construed as prohibiting those laws which " 'change the ingredients of the offense or the ultimate facts necessary to establish guilt.'" 536 So.2d at 215 (Pet. App. A 16), citing Miller v.

Florida, 482 U.S. 423, 107 S.Ct. 2446, 2453, 96 L.Ed.2d 351 (1987) (quoting Hopt v. Utah, 110 U.S. 574, 590, 4 S.Ct. 202, 210, 28 L.Ed.2d 262 (1884)). Changes in the admission of evidence have been held to be procedural. The state court below applied a long-respected doctrine from this court and that doctrine has successfully withstood the test of time.

In Dobbert v. Florida, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977), this Court rejected a criminal defendant's ex post facto claim and relied, in part, on two prior Supreme Court decisions in which changes in the admission of evidence were found to be procedural, Hopt v. Utah, 110 U.S. 574, 4 S.Ct. 202, 28 L.Ed.2d (1884) and Thompson v. Missouri, 171 U.S. 380, 18 S.Ct. 922, 43 L.Ed. 204 (1898). In Hopt, this court stated:

> "[a]ny statutory alteration of the legal rules of evidence which . . . only removes

> existing restrictions upon the competency of certain classes of persons as witnesses, relate to modes of procedure only" and "are not ex post facto in their application to prosecution for crimes committed prior to their passage." 110 U.S. at 589, 590, 4 S.Ct. at 209-10.

Applying the same rationale which resulted in this Court's determination that the evidentiary statutes in Hopt and Thompson were procedural, the Florida Supreme Court concluded:

> As in Hopt, "[t]he crime for which the present defendant was indicted, the punishment prescribed therefor, and the quantity of the degree of proof necessary to establish his guilt, all remained unaffected by" the enactment of section 90.803(23). 110 U.S. at 589-90, 4 S.Ct. at 209-10. As in Thompson, section 90.803(23) "left unimpaired the right of the jury to determine the sufficiency or effect of the evidence declared to be admissible, and did not disturb the fundamental rule that the state. . . must overcome the

> presumption of his innocence, and establish his guilt beyond a reasonable doubt." 171 U.S. at 387, 18 S.Ct. at 924.
>
> (Pet.App.A-16-17).

The application of the child abuse hearsay exception did not punish an act which was innocent when committed, it did not increase any penalty, it did not deprive the defendant of any previously-available defense, and it did not change the quantity or degree of proof necessary to establish the defendant's guilt. As in Thompson, the amendment to the state's evidence code was merely procedural and did not violate the ex post facto clause. See Dobbert v. Florida, 432 U.S. at 293, 97 S.Ct. at 2298. The Florida Supreme Court's analysis was conducted in accordance with long-established principles established by this Court and Glendening has not demonstrated any misapplication of this Court's precedent.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari to the Supreme Court of Florida should be denied.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

88-1803

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1988

DAVID EDWARD GLENDENING,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CERTIFICATE OF SERVICE

I, Peggy A. Quince, a member of the Bar of this Court, hereby certify that on this ____ day of , 1989, three (3) copies of the BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA, in the above-entitled case were

mailed, first class postage prepaid to STUART C. MARKMAN, ESQUIRE, 707 N. Franklin Street, Tenth Floor, P.O. Box 3356, Tampa, Florida 33601. I further certify that all parties to be served have been served.

Respectfully submitted,

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APPENDIX

Fla. Stat. §

92.53 Sexual abuse or child abuse case; videotaping of testimony of victim or witness under age 16.

(1) On motion and hearing in camera and a finding that there is a substantial likelihood that a victim or witness who is under the age of 16 would suffer at least moderate emotional or mental harm if he were required to testify in open court or that such victim or witness is otherwise unavailable as defined in §90.804(1), the trial court may order the videotaping of the testimony of the victim or witness in a sexual abuse case or child abuse case, whether civil or criminal in nature, which videotaped testimony is to be utilized at trial in lieu of trial testimony in open court.

(2) The motion may be filed by:

(a) The victim or witness, or the victim's or witness' attorney, parent, legal guardian, or guardian ad litem;

(b) A trial judge on his own motion.

(c) Any party in a civil proceeding; or

(3) The judge shall preside, or shall appoint a special master to preside, at the videotaping unless the following conditions are met:

(a) The child is represented by a guardian ad litem or counsel;

(b) The representative of the victim or witness and the counsel for each party stipulate that the requirement for the presence of the judge or special master may be waived; and

(c) The court finds at a hearing on the motion that the presence of a judge or special master is not necessary to protect the victim or witness.

(4) The defendant and the defendant's counsel shall be present at the videotaping, unless the defendant has waived this right. The court may require the defendant to view the testimony from outside the presence of the child by means of a two-way mirror or another similar method that will ensure that the defendant can observe and hear the testimony of the child in person, but that the child cannot hear or see the defendant. The defendant and the attorney for the defendant may communicate by any appropriate private method.

(5) Any party, or the court on its own motion, may request the aid of an interpreter, as provided in §90.606, to aid the parties in formulating methods of questioning the child and in interpreting the answers of the child throughout proceedings conducted under this section.

(6) The motion referred to in subsection (1) may be made at any time with reasonable notice to each party to the cause, and videotaping of testimony

may be made any time after the court grants the motion. The videotaped testimony shall be admissible as evidence in the trial of the cause; however, such testimony shall not be admissible in any trial or proceeding in which such witness testified by use of closed circuit television pusuant to §92.54.

(7) The court shall make specific findings of fact, on the record, as to the basis for its ruling under this section.